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No. 88-897

In the Supreme Court of the United States

October Term, 1988

R. H. ASHENBAUGH, et al.,
Petitioners,

v.

CRUCIBLE INC 1975 SALARIED RETIREMENT PLAN,
Respondent.

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

PETER D. POST
(Counsel of Record)
WILLIAM H. POWDERLY III
DANIEL E. WILLE
REED SMITH SHAW & McCLAY
435 Sixth Avenue
Pittsburgh, Pennsylvania 15219
(412) 288-3131

Counsel for Respondent,
CRUCIBLE INC 1975 SALARIED RETIREMENT PLAN

PARTIES TO THE PROCEEDINGS

The sole defendant-respondent in the present case is the Crucible Inc 1975 Salaried Retirement Plan ("Plan"). The sponsor of the Plan was Crucible Inc, a wholly-owned subsidiary of Colt Industries Operating Corp which, in turn, was a wholly-owned subsidiary of Colt Industries Inc. As a result of corporate reorganization, Colt Industries Inc has succeeded to sponsorship of the Plan. The Plan is ultimately administered by the Retirement Committee, which is designated by the Plan-sponsor and, under the Plan's provisions, has the power and duty to interpret the terms of the Plan.

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BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

Respondent, Crucible Inc 1975 Salaried Retirement Plan, requests that the Petition for Writ of Certiorari be denied:

COUNTERSTATEMENT OF THE CASE

The Crucible Inc 1975 Salaried Retirement Plan ("Plan"), a defined benefit, single employer, pension plan as defined in Section 3(2) of the Employee Retirement Income Security Act of 1974 ("ERISA"), 29 U.S.C. § 1002(2), being qualified as defined in Section 401(a) of the Internal Revenue Code ("Code"), 26 U.S.C. § 401(a),

incorporates herein the facts as set forth in the opinion of the United States Court of Appeals for the Third Circuit ("Third Circuit"), except for the Third Circuit's ambiguous reference to a partial termination for purposes of ERISA.[1] For purposes of convenience some of the more pertinent facts are summarized in this section.

The Plan in which the Petitioners (hereinafter "Ashenbaugh" or "Petitioners") participate provides for a Normal Retirement Benefit payable upon retirement on a Normal Retirement Date, which is defined by the Plan as occurring no earlier than the first day of the month following the attainment of age 65.[2] An Early Retirement Benefit is payable upon retirement on an Early Retirement Date, which is defined by the Plan as occurring no earlier than the first day of the month following the attainment of age 55.[3] The amount of the Early Retirement Benefit is the Normal Retirement Benefit arithmetically reduced 5% for each year the Early Retirement Date is prior to the participant's Normal Retirement Date. This reduction has been

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[1]See discussion at footnote 10.

[2]Section 1.1 of the Plan provides in relevant part:

Normal Retirement Date: The first day of the calendar month following the Participant's attainment of age sixty-five (65).

[3]Section 1.1 of the Plan states in relevant part:

Early Retirement Date: (a) With respect to a Salaried Employee who was a Participant on November 30, 1972: the first day of the calendar month next following any date prior to his Normal Retirement Date, on or after his attainment of age fifty-five (55) and his completion of five (5) years of Credited Service, on which he shall retire.

(b) With respect to a Salaried Employee who became a Participant on or after December 1, 1972: the first day of the calendar month next following any date prior to his Normal Retirement Date, on or after his attainment of age fifty-five (55) and his completion of fifteen (15) years of Credited Service, on which he shall retire.

assumed, and so accepted by the Internal Revenue Service, to have the result of the payment of the actuarial equivalent of the Normal Retirement Benefit commencing at the Early Retirement Date.

After 10 years of service, the Plan provides that a participant obtains a nonforfeitable right to a benefit equal in amount to the Normal Retirement Benefit accrued to the date of termination of active participation in the Plan.[4] Participants with such nonforfeitable rights are known as "Deferred Vested Participants." They may receive payment of the amount of their "Deferred Vested Benefit" at age 65, or, if they have at least fifteen years of service, as early as age 55 (arithmetically reduced by 5% a year).

The Plan also provides for a benefit payable to participants who retire on a Thirty Year Retirement Date.[5] If a participant with the required 30 years of Credited Service chooses or is deemed to retire before attaining age 62, a special benefit formula applies which establishes a maximum benefit; whereas, if a participant with the required Credited Service chooses or is deemed to retire after attaining age 62, the same benefit formula applies without the maximum.

The Thirty Year Benefit may be characterized as a "light switch" benefit in the sense that the benefit is "off" until the participant's retirement occurs on a Thirty Year Retirement Date, at which point the benefit turns "on."

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[4]This Plan provision does not apply where the termination of the participant is due to death or events that are defined as retirement.

[5]Section 1.1 of the Plan provides in relevant part:

> *Thirty Year Retirement Date:* The first day of the calendar month next following any date prior to a Participant's Normal Retirement Date, on or after his completion of thirty (30) years of Credited Service, on which he shall retire.

The Thirty Year Benefit is a subsidized early retirement benefit.[6]

Finally, the Plan contained a "window benefit" provision which increased retirement benefits by 5% for participants who retired on or after August 1, 1977 but before August 1, 1986.

Salaried employees at several of the employer's facilities were participants in the Plan. The Midland, Pennsylvania, facility at which the Petitioners were employed was closed due to adverse economic conditions during mid-1982 and virtually all of the employees have been terminated.

Those participants who qualified for a Normal Retirement Benefit, an Early Retirement Benefit, a Thirty Year Benefit, or the "window benefit" received the appropriate retirement benefit. "Deferred Vested Participants", who did not qualify for any of these benefits, were given notice of their nonforfeitable rights to a Deferred Vested Benefit.

Crucible's corporate parent, Colt Industries Inc, sought and obtained a determination letter from the Internal Revenue Service ("IRS") that the Plan, which covered participants at the Midland plant as well as those at other locations, would be deemed to have partially terminated for IRS purposes, under Code § 411(d)(3), 26 U.S.C. § 411(d)(3), on July 31, 1982 as to those participants who were employed at the Midland plant. The partial termination for IRS purposes had no affect on the participants at other locations or the terms of the Plan, except the 10 year vesting provision of the Normal Retirement Benefit.

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[6]Contrary to Ashenbaugh, The Third Circuit never discussed and never held that the Thirty Year Benefit was an "ancillary" benefit. (A.27).

Normally, if a participant employed at the Midland plant were terminated prior to having 10 years of service under the Plan, he would have no right to a benefit. However, since a partial termination of the Plan was determined by the IRS to have occurred effective July 31, 1982, pursuant to Code § 411(d)(3), this service requirement to acquire a right to a "Deferred Vested Benefit" became inoperative with respect to the group of affected terminated participants. Thus, Midland participants, regardless of their length of service, who were terminated after July 31, 1982, were informed by the Plan that they had obtained a nonforfeitable right to a "Deferred Vested Benefit."

The Plan continues in existence today and covers employee-participants employed at other locations by Colt Industries Inc. It has never been completely terminated in the sense of Title IV of ERISA, 29 U.S.C. § 1301, et seq., and no recapture of any remaining surplus assets has been sought.

Neither was the Plan partially terminated by the Pension Benefit Guaranty Corporation ("PBGC") pursuant to ERISA § 4062(f), 29 U.S.C. § 1362(f). Under that section, the assets and liabilities of a plan covering participants in multiple facilities, such as the instant Plan, can be required to be partitioned between terminated and active employees, and the portion of the plan applicable to the closed facility is deemed to have fully terminated for purposes of Title IV. Although notified by the Plan-sponsor of the decline in participation due to the closing of the Midland plant, PBGC did not elect to exercise its right to cause a partial termination of the Plan to occur for purposes of Title IV of ERISA.

The instant dispute involved three claims before the Third Circuit. (We will ignore for the present Ashenbaugh's new claims raised for the first time in the Petition for Writ of Certiorari). One group of Petitioners, who had at least thirty years of Credited Service at the time of termination but had not yet attained age 62 when they retired, claim that their Thirty Year Benefits should have been calculated in accordance with the formula applicable to participants retiring after attaining age 62.

The second group of Petitioners, who did not have thirty years of Credited Service when they terminated employment, claim that they are entitled to Thirty Year Benefits based on the years of employment served to the date of their termination payable unreduced when they would have completed thirty years of service if they had remained employed. These Petitioners also claim to be entitled to have these Thirty Year Benefits paid before the date they would have completed thirty years of Credited Service but reduced by 5% a year from the date when they would have had the thirty years. The Thirty Year Benefits the Petitioners seek are in part claimed to be mandated by Section 4044 of ERISA, 29 U.S.C. § 1344, which, under other facts and if applied literally as urged, would require assets to be allocated to these benefits.

A third group of participants who are eligible for "Deferred Vested Benefits" claim that they are entitled to the Plan's 5% "window benefit" although they did not retire during the window period.

The Plan's Retirement Committee ("Committee"), to whom benefit claims must be referred under the Plan's dispute resolution procedure, Plan § 10.11, denied the Petitioners' claims. In the Committee's judgment, the Petitioners were not entitled under the terms and conditions of the

Plan to the benefits they sought. Further, it was determined that the partial termination of the Plan declared by the IRS pursuant to Code § 411(d)(3) did not change the nature of the Plan's eligibility requirements for the Thirty Year Benefit or the "window benefit".

Finally, the Committee explained that ERISA § 4044 was inapposite to the Petitioners' benefit claims as a complete or partial termination of the Plan had not occurred as defined in Title IV of ERISA. The Committee opined that any attempt to dedicate assets to one group of participants in a case of partial termination for IRS purposes only could result in an unjustified preference to the Petitioners over those who participate in the continuing Plan, should such Plan subsequently terminate for ERISA purposes. Thus, the Committee determined neither ERISA § 4044 nor Plan § 12.1(b) had become operative.[7]

The Petitioners filed suit against the Plan in the United States District Court for the Western District of Pennsylvania pursuant to ERISA § 502(a)(1)(B), 29 U.S.C. § 1132(a)(1)(B), seeking the claimed benefits. Cross-motions for summary judgment were filed. The District Court granted the Plan's motion for summary judgment, holding that the Petitioners were not entitled to the benefits they claimed because (i) they had not met the eligibility requirements contained in the terms and conditions of the Plan, (ii) Code § 411(d)(3) did not act to change the terms and conditions for the benefits at issue, and (iii) under the Plan, ERISA § 4044 was not applicable to the Petitioners'

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[7]Plan § 12.1(b) states that "[i]n the event of termination or partial termination of the Plan, the assets of the trust under the Plan shall be allocated in accordance with the priorities established in Section 4044 of ERISA."

claims because the Plan was fully funded and had not been terminated for ERISA Title IV purposes.

A three-judge panel of the United States Court of Appeals for the Third Circuit, giving no deference to the decisions of the Retirement Committee, affirmed the District Court judgment, with Judge Mansmann concurring and dissenting. Circuit Judge Stapleton, writing for the Third Circuit, considered and rejected all of the employees' claims in a thorough and carefully reasoned opinion.

SUMMARY OF THE REASONS FOR DENYING THE WRIT

This case is unworthy of review by this Court. The main issue discussed in the Petition seems to deal with the meaning of "benefit accrued" for purposes of Code § 411(d)(3). As the Third Circuit explained, however, it makes no difference to the outcome of the dispute; it explained that assuming, *arguendo*, the Thirty Year Benefit to be an accrued benefit does not change the Plan-sponsor's right to establish an accrual method and benefit eligibility requirements it sees fit for this non-normal retirement benefit. Even if an "accrued benefit", meaning a protected benefit for Code § 411(a)(6) and ERISA § 204(g), the Thirty Year Benefit had not accrued to any extent for any of the Petitioners as of the date of the partial termination of the Plan for purposes of Code § 411(d)(3). The Third Circuit also correctly held that the eligibility requirements had to be met by the participants notwithstanding a partial termination under Code § 411(d)(3), but that Petitioners had failed to do so.

The Third Circuit's interpretation of Code § 411(d)(3) as affecting the vesting of benefits, but not benefit accruals, is supported by recent amendments to the Code and

ERISA; for example, ERISA § 204(g), 29 U.S.C. § 1054(g), as amended by the Retirement Equity Act ("REA"), § 301(a)(2), Pub. L. No. 98-397, 98 Stat. 1450-51 (1984). The decision is consistent with the interpretations of the Code by the IRS and of ERISA by the PBGC. The PBGC, in fact, filed an Amicus Curiae Brief in support of the Plan in the present case.

The Third Circuit's decision is not in conflict with any decision of any other court, and certainly not with *Amato v. Western Union Int'l Inc.*, 773 F.2d 1402 (2d Cir. 1985), *cert. dismissed*, 474 U.S. 1113 (1986); *Tilley v. Mead Corp.*, 815 F.2d 989 (4th Cir. 1987), *cert. granted*, 109 S. Ct. 52 (1988); *Blessitt v. Retirement Plan for Employees of Dixie Engine Co.*, 848 F.2d 1164 (11th Cir. 1988) (*en banc*), *vacating*, 817 F.2d 1528 (11th Cir. 1987); or *Shaw v. Int'l Ass'n of Machinists and Aerospace Workers Pension Plan*, 750 F.2d 1458 (9th Cir. 1985), *cert. denied*, 471 U.S. 1137 (1985).

The Third Circuit only discussed *Amato* and *Tilley* in connection with its own alternative grounds for affirming the District Court's grant of summary judgment in favor of the Plan. Thus, the Third Circuit case law discussion Ashenbaugh cites in his Petition is mere dicta within the opinion, and the questions posed, based on that dicta, of no general import or application. Of even greater moment is the fact that the part of the *Amato* decision that Ashenbaugh cites as authority was dicta in the Second Circuit's opinion as well. Moreover, *Tilley*[8] and *Blessitt*

[8]The court in *Tilley* did not address the issue of what constitutes an accrued benefit or a benefit accrued, but held only that ERISA § 4044(a)(6) required that future unearned benefits must be provided before a reversion of assets under ERISA § 4044(d)(1). Thus, no conflict with the Third Circuit is possible.

both involved actual reversions of Plan assets upon complete plan terminations and the consequent required application of Title IV of ERISA—unlike the present case. Therefore, the actual holding by the Third Circuit in this case is not in conflict with the actual holdings of these other appellate courts and intervention by this Court is not required.

None of the four questions set forth in the Petition justify the granting of certiorari by this Court. Ashenbaugh's first question, seeking a determination that the Thirty Year Benefit is an accrued benefit, is moot on the basis of the assumption made by the Third Circuit in Ashenbaugh's favor. Ashenbaugh's second question is not properly before this Court because the claims for benefits it contains were not raised in the District Court and expressly not addressed by the Third Circuit. (A.12, n.7).

Finally, the third and fourth questions do not raise important issues of federal law because ERISA § 4044 by its terms only applies to complete terminations of plans as defined in Title IV of ERISA, not partial terminations as defined in Code § 411(d)(3). Further, ERISA § 4044 is not at issue by virtue of the reference to it in Plan § 12.1(b). The Third Circuit sustained the Retirement Committee's determination, corroborated by the action of the PBGC, that a termination for purposes of Plan § 12.1(b) did not occur. (A. 29, n.15; 30). Ashenbaugh has not sought review of this determination by this Court. Thus, ERISA § 4044 is implicated in this case only by virtue of certain language peculiar to this particular pension plan and only if the Committee's unappealed determination were first overturned.

For these reasons, the Court should deny the writ.

REASONS FOR DENYING THE WRIT

I. THE THIRD CIRCUIT HAS NOT RENDERED A DECISION IN CONFLICT WITH THAT OF ANY OTHER CIRCUIT ON THE QUESTIONS PRESENTED IN THE PETITION.

A. There Can Be No Conflict With Any Other Circuit Because The Third Circuit Expressly Assumed That The Thirty Year Benefit Was An Accrued Benefit For Purposes Of The Appeal.

Much of the Petition is devoted to a complicated discussion about the meaning of "benefit accrued" for purposes of Code § 411(d)(3). The discussion misrepresents the Third Circuit opinion and is misleading as it suggests that it would make a difference in the outcome of the dispute if the Thirty Year Benefit were determined to be an accrued benefit.

Moreover, Ashenbaugh suggests that, by not holding that the Thirty Year Benefit was an accrued benefit, the Third Circuit opinion conflicts with that of the Second Circuit in *Amato*. As is apparent from Judge Stapleton's opinion, however, the Third Circuit expressly assumed for purposes of Ashenbaugh's appeal that the Thirty Year Benefit was an accrued benefit or a benefit subject to accrual for purposes of Code § 411(d)(3). Still it held that Petitioners were not entitled to any of the benefits they sought, since they had not satisfied the Plan terms and conditions for them. The Third Circuit stated:

> As we will discuss hereafter, the parties here disagree on whether the Thirty-Year Benefit falls within the statutory definition of an "accrued benefit." *We will assume for the moment that it does come within that definition and that it is thus to be treated in the same*

> *manner as the normal retirement benefit.* As we have seen, an employee's accrued benefit at any particular point in time is what a fully vested employee would be entitled to receive under the terms of the plan if employment ceased at that particular point in time. Here, the Plan provides that an employee is entitled to receive Thirty-Year Retirement Benefits only when he or she retires on a "Thirty-Year Retirement Date", i.e., only after having given 30 years of service. Thus, even if the Thirty-Year Benefit is to be treated as an accrued benefit, it does not "accrue" for any employee until he or she has given 30 years of service.

(A. 18) (emphasis added).

> We therefore believe the issue posed by plaintiffs—i.e., whether Plan § 12.1(c) or Code § 411(d)(3) require the payment to them of Thirty-Year Benefits—can be resolved without determining whether early retirement benefits of the sort in dispute here can ever be properly classified as an "accrued benefit." . . .

(A. 21).

> [E]ven if the Thirty-Year Benefit were considered an accrued benefit, Plan § 12.1(c) would not have the effect of superseding the age and service requirements of the Plan. It follows that the Plan fiduciaries' denial of Thirty-Year Benefits must be sustained.

(A. 27).

The Third Circuit expressly assumed for purposes of Ashenbaugh's appeal that the Thirty Year Benefit was an accrued benefit. This assumption, in and of itself, cannot have any precedential value. For this reason, the Third Circuit decision cannot be construed as being in conflict with *Amato*, with Petitioners' interpretation of *Amato*, or with any other decision.

Petitioners' first question, therefore, does not warrant review by this Court. Even if this Court were to agree with Petitioners' position that the Thirty Year Benefit was an accrued benefit, such a holding would not ordain any modification or reversal of the holding of the Third Circuit.

B. Petitioners Have Not Identified Any Conflict Between The Third Circuit And Any Other Circuit Court With Respect To The Interpretation of Section 411(d)(3) Of The Code And Section 4044 Of ERISA.

None of the decisions cited by Petitioners demonstrate either confusion or conflict between the Third Circuit and any other circuit concerning any question posed in the Petition.

1. The Third Circuit decision can not conflict with any other court on the question whether the Thirty Year Benefit is a benefit accrued for purposes of Section 411(d)(3) of the Code.

The first portion of the The Third Circuit opinion, which concerns Code § 411(d)(3), at first appears to contain three holdings:

1. Assuming that the Thirty Year Benefit is an accrued benefit, Ashenbaugh has not satisfied the conditions contained in the Plan in order to have a right to it, (A. 18);

2. Assuming that the Thirty Year Benefit is a protected accrued benefit, neither the Plan nor the law required the Thirty Year Benefit to be subject to accrual ratably over the working life of the participants, (A. 27); and

3. The Thirty Year Benefit is not an accrued benefit under the law or the terms of the Plan, (A. 21).

Only the first holding was necessary to the Third Circuit's decision, (A. 4); indeed, the Court of Appeals indicated in its opinion that it did not have to decide whether the Thirty Year Benefit was an accrued benefit in order to resolve the dispute between the parties. (Part IA, above). The Third Circuit held simply that, given its working assumption and the terms of the Plan, the Petitioners had not satisfied the preconditions provided in the terms of the benefit that would cause the Thirty Year Benefit to become payable, even if it were deemed an accrued benefit.

For the purpose of discerning a conflict among the circuits as to the nature of an accrued benefit, the initial holding of the Third Circuit makes the remainder of this portion of its opinion—the discussion of *Amato* and other cases, the definition of an "accrued benefit" and the meaning of Code § 411(d)(6)—all obiter dictum. Therefore, there can be no conflict between the Third Circuit's dicta and *Amato*.

Moreover, none of the cases cited by Ashenbaugh, not even *Amato*, involve or interpret Code § 411(d)(3)—except in dicta. Rather, they involve complete terminations under ERISA § 4044 or plan amendments under Code § 411(d)(6). (Of course, the instant case involves Code § 411(d)(3) alone.)

The critical issue in *Amato* involved a plan amendment which would eliminate certain early retirement benefits. This amendment would have affected even those who had fulfilled all the conditions inherent in the benefit but had not yet retired. The question was, whether under ERISA § 204(g) and Code § 411(d)(6) this amendment constituted a decrease in the plaintiffs' "accrued benefits." The Second Circuit held that the amendment resulted in a

prohibited reduction in the plaintiffs' accrued benefits and remanded the case to the district court:

> Thus our review of the pertinent statutes and regulations in light of Congress' expressed intent and Treasury regulations and interpretations satisfies us that the Western Union Amendment eliminating plaintiffs' unreduced early retirement benefits appears to violate ERISA § 204(g) and I.R.C § 411(d)(6), which prohibit a decrease in a participant's "accrued benefit".

Amato, 773 F.2d at 1414.

The *Amato* plaintiffs sought a declaratory judgment that the amendment was null and void; the Second Circuit's remand would direct such a declaration. With the amendment stricken, the plan would return to its pre-amendment status and the question concerning the alternative argument addressed by the Second Circuit, that the rights to that early retirement benefit become nonforfeitable as a result of a partial termination under Code § 411(d)(3) when the plan is fully funded, becomes moot.

Therefore, the remainder of the *Amato* opinion is dicta, notably the sections treating the factual determination whether a partial termination of the plan had taken place under Code § 411(d)(3), and interpreting the obligations of the plan to make distributions in accordance with ERISA § 4044. Thus, these latter portions of the *Amato* opinion cannot be relied upon to support Ashenbaugh's claim of a conflict with the Third Circuit.[9]

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[9]Ashenbaugh also cites *Shaw* and *Blessitt* for the proposition that these cases illustrate a conflict between the Third Circuit's holding in this case and the law in the Ninth and Eleventh Circuits, respectively. Neither case presents a conflict, in fact both are in harmony with the

(Continued on next page)

Nor is there a conflict among different panels of the Third Circuit concerning the treatment of early retirement benefits for purposes of Code § 411(d)(3). The one case that Petitioners cite as indicating conflict, *Chait v. Bernstein*, 835 F.2d 1017 (3d Cir. 1987), is entirely consistent with that of the present one. *Chait* holds only that Code § 411(d)(6) would prohibit the reduction of an accrued benefit by an amendment, and that a Code § 411(d)(3) termination, even if partial, does not mean that Title IV of ERISA will or should have any application. Naturally, even if there were a conflict among panels of the Third Circuit, this typically would not be a matter for this Court to resolve.

Ashenbaugh also argues that the definition of "accrued benefit" contained in Code § 411(a)(7)(A) has consistently been misapplied by courts when applied to Code § 411(d)(3) and (6). He admits, however, that no court has ever embraced this interpretation of Code § 411(d)(3). (Petition at 9-10). Thus, the Third Circuit decision can not be found in conflict with any other court with respect to

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(Continued)
holding of the Third Circuit in this case. In both *Shaw* and *Blessitt*, the circuit courts refused to eliminate an integral part of an accrued benefit.

In *Shaw*, the Ninth Circuit held that the *form* of the benefit, specifically the cost of living increase, was an integral part of the normal retirement benefit. Here, the 30 year eligibility requirement is an integral part of the Thirty Year Benefit which the Third Circuit refused to disregard.

The alleged "conflict" with *Blessitt*, is simply the result of Ashenbaugh's misstatement of the Eleventh Circuit's holding. In fact, the holding in *Blessitt* is consistent. As the court stated in *Blessitt*, 848 F.2d at 1171, "well established regulatory interpretation is inconsistent with [the] argument that the law requires a plan to pay unaccrued benefits upon the termination based upon future years of service not actually worked."

this novel theory. Moreover, the Third Circuit clearly understood Ashenbaugh's novel theory, and rejected it by holding that Code § 411(d)(3) did not change the nature, terms or accrual of the Thirty Year Benefit, even if it were assumed to be an accrued benefit under the terms of the Plan. To the extent any portion of the novel theory was not expressly addressed by the Third Circuit, it would seem inappropriate for this Court to review this novel interpretation without adequate review and development of the interpretation in the lower courts.

2. Because the Third Circuit's discussion of ERISA § 4044 was dicta, its decision cannot be in conflict with that of any court.

Section 4044 of ERISA expressly applies only in cases of full or complete termination of employee benefit pension plans. The present case involves only a partial termination for purposes of Code § 411(d)(3) and no other law. Therefore, the present case can add nothing to the controversy surrounding *Amato, Tilley* or *Blessitt.*

Plan § 12.1(b) does refer to ERISA § 4044. The Retirement Committee, in accordance with its obligation to interpret the terms of the Plan, determined that § 12.1(b) did not require the application of ERISA § 4044 under the instant facts because no partial termination for purposes of Title IV of ERISA occurred, as confirmed by the PBGC's inaction, even though a partial termination did occur for purposes of the IRS. *United Steelworkers of America v. Harris & Sons Steel Co.*, 706 F.2d 1289 (3d Cir. 1983).

Furthermore, Ashenbaugh has not challenged the Plan's interpretation of its own terms. The Third Circuit, giving no deference to the decision of the Retirement Committee, concluded:

> The plaintiffs argue that the Plan should have specified, when it incorporated § 4044, that the provision should be read narrowly, and that since the Plan failed to do so § 4044 and Plan § 12.1(b) must be read broadly. We disagree. The reading plaintiffs would give § 4044 is simply wrong, *and § 12.1(b) cannot be considered to incorporate that reading.*

(A. 29, n. 15) (emphasis added).

The holding of the Third Circuit was that the interpretation of § 12.1(b) by the Retirement Committee was correct, regardless of the standard of review.[10] What the Third Circuit said concerning ERISA § 4044 was, therefore, dicta because, by affirming the Plan's interpretation of Section 12.1(b), the Third Circuit was not required to confront the meaning of ERISA § 4044. Consequently, the Third Circuit's comments on the meaning of ERISA § 4044, although correct and consistent with those of the PBGC in its Amicus Brief, is dicta and cannot be in any meaningful conflict with the holding of another circuit. Moreover, the

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[10]Footnote 1 of the Third Circuit opinion is ambiguous in its reference to a partial plan termination for ERISA purposes. (A. 5). By saying that there was no dispute whether there was a partial termination of the Plan under ERISA, the Court of Appeals must have intended to say that the parties agreed that no partial termination for purposes of Title IV of ERISA occurred. The PBGC determination was known to the parties, the district court, and the Third Circuit, yet the determination was not challenged and the issue was not argued, nor was it raised by the PBGC in its Amicus Brief which assumed ERISA § 4044 to be inapplicable. It is in this sense that there was no dispute. The Plan Retirement Committee held in its decision denying benefits that no partial termination for ERISA purposes took place and that Plan § 12.1(b) was intended to be interpreted narrowly. The Committee rejected the argument that a partial termination for IRS purposes would also trigger a distribution of Plan assets. The Third Circuit expressly sustained the Committee. (A. 29, n.15). Footnote 1 goes on to correctly indicate that a termination for purposes of the IRS is distinguishable from one occurring under ERISA.

question of interpretation of this particular pension plan is not of such general importance to warrant review by this Court.

Perhaps in the hope of demonstrating a conflict, Ashenbaugh has been content only to raise a general objection to the way the Third Circuit discusses ERISA § 4044. But this is not at issue in the present case. Even if this Court were to agree with Ashenbaugh's interpretation of ERISA § 4044, as creating substantive rights, it would have no affect on the holding of the Third Circuit or the District Court that the Retirement Committee was correct in interpreting an application of Plan § 12.1(c) under the facts not to require an automatic reversion or distribution of assets at all under Plan § 12.1(b).

In addition, the Third Circuit discussion regarding the application of ERISA § 4044 as found in other courts of appeals decisions, while shown above to be dicta, is also factually dissimilar from the present matter. The Fourth Circuit's decision in *Tilley* concerned the interpretation of ERISA § 4044 upon the actual termination of a plan and a reversion of the plan's assets. *Tilley,* 815 F.2d at 991. The Eleventh Circuit's decision in *Blessitt,* held that ERISA § 4044 does not require a plan to calculate benefits on the basis of anticipated future years of service upon the actual termination of a plan and the reversion of the plan's assets. *Blessitt,* 848 F.2d at 1179. No complete termination of a pension plan, no allocation of assets and no reversion of surplus assets to the Plan-sponsor occurred in the case *sub jure.*

Accordingly, the Third Circuit's decision is not in conflict with *Amato, Tilley,* or *Blessitt* regarding ERISA § 4044.

II. THE THIRD CIRCUIT DECISION IS SOUND AND IN ACCORDANCE WITH LAW.

A. The Third Circuit Was Correct In Holding That The Thirty Year Benefit, Even If Assumed To Be An Accrued Benefit, Was Not Required By Law Or The Terms Of The Plan To Accrue Ratably Over The Working Life Of The Participants.

Although the Third Circuit assumed, without deciding, that the Thirty Year Benefit was an accrued benefit, it concluded that "a participant does not become entitled to any benefit under the Thirty-Year Retirement provisions until the specified conditions of those provisions are met . . ."[11] (A. 4) Thus, while not critical to this Court's decision on whether a writ should issue in this case, the Plan wishes to make clear that the Third Circuit's alternative holding that the Thirty Year Benefit is not a benefit that accrues over time or on a periodic basis is sound and in accordance with law, such that it is not among the "benefits accrued" under Code § 411(d)(3).

It is Ashenbaugh's position that the Thirty Year Benefit normally does not accrue over time but only upon a Thirty Year Retirement Date. He believes, however, that if a Code § 411(d)(3) partial termination should occur, then the requirement that there occur a Thirty Year Retirement Date implies a 30 year vesting schedule and causes the benefit to retroactively accrue over time by virtue of that Code section. (A. 20, n. 11). Ashenbaugh's interpretation

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[11]While those Ashenbaugh petitioners without 30 years of Credited Service did not satisfy the precondition for the Thirty Year Benefit—retirement on a Thirty Year Retirement Date—should any of them subsequently again be employed and work for any employer covered by the Plan, they would be entitled to obtain additional years of Credited Service towards benefit eligibility in accordance with Code § 411(a)(4).

misconstrues the Thirty Year Benefit. Nothing in the Code. ERISA or the Plan requires this result. No other law or regulation requires the Thirty Year Benefit to accrue in any manner other than all-at-once upon the participant's fulfillment of all benefit conditions.

The legislative history of ERISA shows that Congress was aware at the time it passed the statute that a number of employers provided "30 and out" pensions as well as other early retirement options, and Congress did not wish to discourage the establishment of these benefits. Congress was also aware that it had to establish periodic accrual requirements for normal retirement benefits in order to prevent "back loading" by employers, which, if allowed, would thwart the vesting rules as to the normal retirement benefit. Congress satisfied both of these goals by establishing three acceptable optional methods under which a normal retirement benefit had to ratably accrue and, at the same time, carefully limiting such accrual rules to normal retirement benefits. The statutory accrual rules, in both ERISA § 204(a) and the Code § 411(b)(1), make no reference to any other benefits, including early retirement benefits, that were not mandated as being required in a plan. Thus, Congress left such unrequired benefits and the time, as well as method of accrual, to be controlled by the plan's terms alone.

House bill, H.R. 2, an early version of ERISA, defined "accrued benefit" in terms of the benefit payable upon the attainment of normal retirement age. H.R. 2, 93d Cong., 2d Session (1974), *reprinted in*, III, *Legislative History of the Employee Retirement Income Security Act of 1974* at 3911. The House Committee Report states:

> Generally, an individual's "accrued benefit" under a defined benefit plan is to be expressed in the form of

> an annual benefit commencing at normal retirement age. Normal retirement age is the age specified in the plan, which may not be later than age 65 (or, if later, the 10th anniversary of the time the participant commenced participation in the plan).

H.R. Rep. No. 807, 93d Cong., 2d Sess., *reprinted in* 1974 U.S. Code Cong. & Admin. News 4726.[12]

The House Committee Report then discusses the standards of accrual permitted by ERISA. It is during this discussion that it recognizes the existence of early retirement benefits and their exemption from the accrual standards.

> In order not to impose an undue cost burden on plans which provide for early retirement (for example "30 and out" plans) the committee bill makes clear that the fact that benefits under the plan may be payable to certain employees before normal retirement age may be disregarded [for accrual loading calculations].

Id at 4727. (Brackets added).

The Senate struck out all of the House bill after the enacting clause and substituted its own version. The Committee of Conference agreed to a substitute for both the Senate amendment and the House bill. It is within this context that the following quotation from the Joint Explanatory Statement of the Committee of Conference must be read:

> [T]he accrued benefit does not include the value of the right to receive early retirement benefits, or the value of social security supplements or other benefits under

[12]Section 1.1 of the Plan specifies that the normal retirement age is 65. Therefore, the retirement benefit payable at 65 is the benefit which under the Plan must accrue over time under ERISA.

> the plan which are not continued for any employee after he has attained normal retirement age . . .
>
> In the case of a defined benefit plan, the accrued benefit is to be determined under the plan, subject to certain requirements. In general, the accrued benefit is to be defined in terms of the benefit payable at normal retirement age. Normal retirement age generally is to be the age specified under the plan . . .
>
> Each defined benefit plan is to be required to satisfy one of three accrued benefit tests (which limit the extent of "back-loading" permitted under the plan).

H.R. Conf. Rep. No. 93-1280, 93d Cong., 2d Session (1974), *reprinted in,* III, *Legislative History of the Employee Retirement Income Security Act of 1974,* 4518, 4540.[13]

Early retirement benefits are not required to accrue over time in accordance with an established or implied ERISA accrual standard. The nature of an early retirement benefit, including its accrual, may be created and designed in the discretion of the plan-sponsor. *Alessi v. Raybestos-Manhattan, Inc.,* 451 U.S. 504, 513 (1981). As was the Thirty Year Benefit, they may be established as a light-switch benefit in which accrual occurs all-at-once upon the fulfillment of benefit eligibility preconditions and payment establishes vesting rights.

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[13]This statement definitively answers Ashenbaugh's interpretation of a similar statement in the earlier House Report found in his Petition at page 23 and any alleged confusion as to the legislative history or congressional intent. The Committee of Conference did not intend "or" to mean "such as," and it did not intend early retirement benefits to be protected accrued benefits.

B. The Third Circuit Correctly Held That Section § 411(d)(3) Of The Code Is A Vesting Provision Only And Does Not Alter The Nature Of The Benefit Or Such Benefit's Preconditions Contained In The Plan.

Looking at the definition of the meaning of nonforfeitable makes clear that, Congress knew the difference between rights and benefits becoming nonforfeitable.

> The term "nonforfeitable" when used with respect to a *pension benefit or right* means a claim obtained by a participant . . .

29 U.S.C. § 1002(19); Section 4001(8) of ERISA, 29 U.S.C. § 1301(8).

Thus, as it expressly states and as the Third Circuit correctly noted, Code § 411(d)(3) is a provision that only deals with "rights of all affected employees" becoming nonforfeitable. (A. 19). It does not require that benefits, which have not yet accrued, become nonforfeitable by accelerating their accrual. It does not require that benefit eligibility requirements be eliminated or deemed satisfied. As the Third Circuit stated:

> [Its] purpose is to guarantee to employees who would not otherwise have any vested right to any pension benefits at the time of a plan termination or partial termination that they be treated as having a fully vested right to any benefits that have accrued and are funded.

(A. 19).

Code § 411(d)(3) has never been considered to alter benefits upon plan terminations.[14] In *Nachman Corp. v. PBGC*, 446 U.S. 359, 372-373, *reh'g denied*, 448 U.S. 908 (1980), this Court made it clear that, upon the termination of a plan, it is the *right, not the benefit itself*, that becomes nonforfeitable under ERISA.[15]

It also bears mentioning that, contrary to Ashenbaugh, the IRS has never held that the "retirement-type subsidy" portion of an early retirement benefit is a protected

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[14]The IRS has never stated that a mere expectation or contingency was an accrued benefit, or that upon termination or partial termination of a plan the requirements necessary to have the expectation come to fruition would be eliminated or the contingency removed. At the time of Ashenbaugh's initial claims and the decisions of the Plan Administrator and the Retirement Committee, the IRS had published two Revenue Rulings that dealt with terminated plan liabilities: Rev. Rul. 83-52, 1983-1 C.B. 87; and Rev. Rul. 85-6, 1985-1 C.B. 133. Revenue Ruling 85-6, which modified and superseded the prior one, is more illustrative of the IRS's position both before and after addition of Code § 411(d)(6) by the Retirement Equity Act of 1984. The ruling demonstrates that Code § 411(d)(6) assumes that benefit preconditions continue to be in effect in order to make it possible for participants to subsequently satisfy the eligibility requirements for early retirement subsidies.

In addition, the PBGC filed an Amicus Curiae Brief in the present case in opposition to the interpretation of Ashenbaugh. The Third Circuit quoted the brief of the PBGC, "[The Plan] nowhere provides that the 'age and service requirements . . . were removed upon the occurrence of [the] Plan termination,' as appellants contend." (A. 20, quoting PBGC Amicus Curiae Brief at 9).

[15]This Court, in *Alessi*, 451 U.S. at 511, addressed the question "what defines the content of the benefit that, once vested, cannot be forfeited?" The Court stated that ERISA is a minimum regulatory statute and it is the private parties, not the statute, that control the level and nature of benefits. *Id.* Neither ERISA nor the Code creates the benefits; they merely establish that, upon termination, one has a nonforfeitable *claim* "to that part of an immediate or deferred benefit under a pension plan which arises from the participant's service, which is unconditional, and which is legally enforceable against the plan." 29 U.S.C. § 1002(19).

accrued benefit under Code § 411(d)(6), when the preconditions for the benefit have not been satisfied. Moreover, in the Congressional deliberation of REA, the Senate Finance Committee specifically addressed the treatment of a 30-year subsidized early retirement benefit as follows:

> [I]f a plan is amended to eliminate a subsidized early retirement benefit for employees who have completed 30 years of service, then the plan would not be required to provide the subsidy to an employee who never completes 30 years of service and it would not be required to provide benefits to such an employee before the normal retirement age.

S. Rep. No. 575, 98th Cong., 2d Sess., at 28, *reprinted in* 1984 U.S. Code Cong. & Admin. News 2547, 2574.

We are aware of no indication in the legislative history of REA that Congress intended a different treatment of a subsidized 30-year early retirement benefit for purposes of § 411(d)(3) than the treatment discussed in the context of § 411(d)(6). The Third Circuit explained that even if the amendments enacted by REA were applicable at the time the instant dispute arose, Ashenbaugh's claims still would be without merit. (A. 27).

Ashenbaugh simply is taking out of context quotations from the IRS Amicus Curiae Brief in *Amato.* In fact, the IRS stated in its Amicus Brief in *Amato:*

> Thus, the effect of the November 16, 1982 Amendment was to deprive plaintiffs of the benefit previously afforded to them under the Plan, to retire prior to age 65 with full benefits (*provided* they met the age and length of service requirements specified in the "Class A" or "Class 75" pension options).

IRS Amicus Curiae Brief at p. 389 (emphasis added).

The IRS here clearly recognizes the continued viability of the terms of the Plan which specify benefit preconditions. The Third Circuit's alternative holding in this case is fully consistent with the IRS's position.

C. The Third Circuit Correctly Found That The Petitioners Were Not Entitled Under The Terms Of The Plan To The Window Benefit Or Benefits Calculated Without Regard To The Provisions Of Plan § 4.3(b).

Ashenbaugh's petition contains claims that have not been made before in this litigation. He now claims a future entitlement to a 5% increase in his benefits under Plan § 5.2 when he would have reached a retirement date but for his termination, and additional benefits when he reaches age 62. These were not among his claims for benefits before the Third Circuit, where he only claimed to have a present right to these benefit add-ons.

The Third Circuit itself first raised the specter of this new issue concerning the future right to these add-ons. (A. 12, n. 7). However, the Circuit stated that the District Court properly did not address the issue, and the Circuit expressly chose not to do so as well. *Id.*

In addition, Ashenbaugh presented no argument in his Petition for these new benefit claims, no argument why the Third Circuit's denial of these benefits at the present time was in error, and no cases in conflict with the holding of the Third Circuit.

Accordingly, because no grounds have even been suggested as to why this Court should grant certiorari on the second question in the Petition, and because the question is of no general interest or importance requiring review, this Court should deny the writ.

CONCLUSION

For the reasons hereinabove set forth and on the authorities herein cited, we respectfully submit that a Writ of Certiorari should not issue to the Court of Appeals for the Third Circuit.

Respectfully submitted,

PETER D. POST
(Counsel of Record)
WILLIAM H. POWDERLY III
DANIEL E. WILLE

REED SMITH SHAW & McCLAY
435 Sixth Avenue
Pittsburgh, PA 15219

Counsel for Respondent,
CRUCIBLE INC 1975 SALARIED
RETIREMENT PLAN

CERTIFICATE OF MEMBERSHIP

It is hereby certified that all of the attorneys whose names appear below are members of the bar of this Court.

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PETER D. POST

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DANIEL E. WILLE